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No. 93-1001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALLIED-BRUCE TERMINIX COMPANIES, INC.
AND TERMINIX INTERNATIONAL COMPANY,

Petitioners,

v.

G. MICHAEL DOBSON, WANDA C. DOBSON
STEVEN GWIN, AND JAN GWIN,

Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF AMICUS CURIAE FOR THE AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

When Congress has the power, under the Commerce Clause, to regulate a transaction, but the parties did not contemplate "substantial" interstate activity when they entered into the contract for that transaction, does the contract "evidenc[e] a transaction involving commerce" within the meaning of Section 2 of the Federal Arbitration Act (9 U.S.C. § 2)?

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INTEREST OF THE AMICUS

The American Council of Life Insurance is the largest life insurance trade association in the United States, representing the interests of 640 member life insurance companies.[1] These companies currently underwrite 90.9 percent of the life insurance in force in legal reserve life insurance companies in the United States.

[1] Counsel for both the Petitioners and the Respondents have consented to the filing of this brief. Their consents are on file with the Clerk.

Ensuring that the Federal Arbitration Act is applied as broadly as possible is a matter of vital importance to the *amicus*'s members. These companies employ approximately 250,000 insurance sales representatives who have registered with the National Association of Securities Dealers ("NASD") to sell securities and, in conjunction with that registration, have agreed to arbitrate all disputes with their insurer-employers. Because of its genuine interest in promoting enforcement of arbitration agreements, therefore, the *amicus* submits this brief to offer the Court some reasons, in addition to those advanced by the Petitioners, why it should reverse the decision below.

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2 (1988), provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 1 of the Federal Arbitration Act, 9 U.S.C. § 1 (1988), provides in pertinent part:

> . . . "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation . . . .

STATEMENT

1. Because Petitioners set the facts forth fully in their brief, the *amicus* only summarizes the facts here. In August, 1987, respondents Steven and Jan Gwin ("the Gwins"), who owned a house in Alabama, entered into a contract with petitioner Allied-Bruce Terminix Companies, Inc. ("Terminix Service") for termite protection services ("the contract"). Appendix to Petition for Certiorari ("Pet. App."), at 1a-2a. Terminix Service is an Arkansas corporation with offices in Alabama and a number of other states. Pet. App. 2a. The contract was guaranteed by petitioner Terminix International Company ("Terminix International"), a limited partnership with its principal place of business in Tennessee. *Id*. The contract contained an arbitration clause, which provided, in pertinent part, that "any controversy or claim between [the parties] arising out of or relating to the interpretation, performance, or breach of any provision of this agreement shall be settled exclusively by arbitration." Petition for Certiorari ("Pet."), at 4.

In 1991, the Gwins sold their house to respondents G. Michael Dobson and Wanda C. Dobson ("the Dobsons"). Pet. App. 2a. The sales agreement required the Gwins to have the house inspected for termite infestation. *Id*. Terminix Service performed a visual inspection and reported that it had observed no evidence of active infestation. *Id*.

When the sale closed, the contract was transferred from the Gwins to the Dobsons. Pet. 4. After the closing, the Dobsons discovered termite damage to the house. Pet. App. 2a. The Petitioners (hereinafter "Terminix") provided repairs and further treatment in accordance with the terms of the contract. Pet. 5. Much of the material and equipment used to treat the house was purchased in other states and brought into Alabama. Pet. 5 n.6.

2. The Dobsons were not satisfied and sued Terminix in an Alabama trial court, alleging both breach of contract and claims sounding in tort. Pet. App. 2a. Relying upon the arbitration clause in the contract, Terminix moved to compel arbitration and

to stay the state court litigation. *Id.* The trial court denied that motion in a one-sentence order. Pet. App. 9a.

3. Terminix appealed the denial of its motion to the Alabama Supreme Court, which affirmed the decision of the trial court. Pet. App. 8a. The Alabama Supreme Court acknowledged that, if the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* (1988 & Supp. II 1990), were applicable, it would pre-empt Alabama law (which denies enforcement to pre-dispute arbitration agreements) and make the arbitration agreement enforceable. Pet. App. 2a-3a. The court further acknowledged that, if the contract in question "evidenc[ed] a transaction involving commerce" within the meaning of Section 2 of the FAA, 9 U.S.C. § 2, then the FAA would apply. Pet. App. 4a. However, it held that contracts do not "evidenc[e] a transaction involving commerce," even if the performance of those contracts actually has some nexus with interstate commerce, unless the parties, at the time that they entered into the contract, "*contemplated* substantial interstate activity." *Id.* (citation omitted). It then held that the parties to this case had not "contemplated substantial interstate activity" when they entered into the contract and that the FAA therefore did not apply. Pet. App. 4a-7a.

SUMMARY OF ARGUMENT

I. As this Court has recognized in prior decisions, Congress enacted the FAA, pursuant to its powers under the Commerce Clause of the Constitution.

The Commerce Clause authorizes Congress to regulate all activities that "affect" or otherwise have an actual nexus with interstate commerce. If the activities undertaken pursuant to a contract actually turn out to have the required nexus with interstate commerce, then Congress has the power to regulate those activities regardless of whether the contracting parties, when they entered into the contract, "contemplated" that performance of the contract would involve "substantial interstate activity."

Consequently, under the Commerce Clause, Congress may enforce agreements to arbitrate disputes in cases (such as the

present one) where the performance of the underlying contract has actually affected interstate commerce, and may do so even if one or more of the parties did not originally expect that performance of the contract would involve substantial interstate activity.

II. For the foregoing reasons, the holding of the court below amounts to a finding that, in enacting Section 2 of the FAA, Congress chose not to exercise all of the powers available to it under the Commerce Clause. However, both the plain language of the FAA and its underlying purposes, as identified in prior decisions of this Court, indicate that Congress did intend the FAA to reach all transactions within the scope of congressional authority under the Commerce Clause.

Certainly, the plain language of the FAA does not limit its reach in the manner suggested by the court below. By its terms, the FAA applies to both pre-dispute and post-dispute agreements to arbitrate controversies arising out of "a contract evidencing a transaction involving commerce." Thus, if one were to interpret this phrase as including only those contracts where the parties contemplated substantial interstate activity at the time of contracting, then the enforceability of agreements to arbitrate *existing* disputes, made long after the parties had entered into the underlying contract, would depend not on what the parties knew when they agreed to arbitration, but on what they expected when entering into the underlying contract. It is difficult to imagine why Congress would mandate such an illogical result.

Moreover, as this Court has held in prior decisions, Congress' purpose in enacting the FAA was to pre-empt state law that disfavored arbitration agreements and to ensure that such agreements were enforced according to their terms. Naturally, then, Congress would want to pre-empt such state law as far as the Commerce Clause would permit. The only conceivable reason for Congress to limit the application of Section 2 (and thus the FAA) to cases in which the contracting parties contemplated substantial interstate activity would be to prevent unfair surprise by application of the FAA where the parties did not expect it. But there was no reason for Congress to worry about anyone

being unfairly "surprised" by application of the FAA when, as this Court has held, the FAA merely effectuates the intentions of the parties by enforcing their own agreements to arbitrate.

ARGUMENT

I. CONGRESS IS NOT LIMITED, UNDER THE COMMERCE CLAUSE, TO REGULATING ONLY THOSE TRANSACTIONS WHERE THE CONTRACTING PARTIES ORIGINALLY CONTEMPLATED SUBSTANTIAL INTERSTATE ACTIVITY

It is well established that "[t]he Federal Arbitration Act rests on the authority of Congress to enact substantive rules under the Commerce Clause." *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984); *Perry v. Thomas*, 482 U.S. 483, 489 (1987).[2] And it has long been recognized that, under the Commerce Clause, Congress may regulate activities that actually affect interstate commerce. It does not matter, for purposes of the Commerce Clause, whether the parties to an arbitration agreement believed, when entering into the underlying contract, that the performance of the contract would involve "substantial interstate activity." What matters is whether, in retrospect, the activities undertaken pursuant to the contract actually had the required nexus with interstate commerce.

"No all-embracing definition [of interstate commerce] has ever been formulated." *Carter v. Carter Coal Co.*, 298 U.S. 238, 298 (1936). However, it is well established, and has long been recognized by this Court, that Congress' powers under the Commerce Clause are very broad and that "the commerce power extends not only to 'the use of channels of interstate or foreign commerce,' and to 'protection of the instrumentalities of interstate commerce . . . or persons or things in commerce,' but also to 'activities affecting commerce.'" *Hodel v. Virginia Surface*

[2] The Commerce Clause provides that Congress has the power "[t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3.

Mining & Reclamation Ass'n, 452 U.S. 264, 276-277 (1981) (quoting *Perez v. United States*, 402 U.S. 146, 150 (1971)). *See also Fry v. United States*, 421 U.S. 542, 547 (1975) (under the Commerce Clause, Congress may regulate even transactions that, when viewed in isolation, are of a "purely intrastate" nature, if "the activity, combined with like conduct by others similarly situated, affects commerce among the States"); *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) ("The power of Congress in this field [interstate commerce] is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere"); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) ("The commerce power . . . extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to . . . the effective exertion of the granted power to regulate interstate commerce").[3]

Obviously, then, the performance of a contract may have the required nexus with interstate commerce, even if it does not actually involve "substantial interstate activity." Therefore, it can hardly be necessary, for the Commerce Clause to apply, that the contracting parties have *foreseen* such activity. Indeed, this Court has never held, as far as the *amicus* can determine, that

[3] Certainly, based on the facts of the present case, there can be no question that Terminix, in performing its contractual obligations, engaged in the kind of activities that Congress may regulate under the Commerce Clause. Terminix has offices and does business in a number of states. Pet. App. 2a. Moreover, in performing its obligations under the contract at issue, Terminix used materials and equipment that were purchased in other states and then brought into Alabama. Pet. 5 n.6. As this Court has held, "[n]o commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause." *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 553 (1944).

notwithstanding any actual nexus with interstate commerce, Congress' authority under the Commerce Clause is limited to only those transactions where the parties, at the time of contracting, believed that the transaction would involve "substantial interstate activity."

Moreover, prior holdings of this Court as to the scope of the FAA strongly suggest that the Court does not view the applicability of the Commerce Clause as being dependent upon the original intentions of the parties. In interpreting the language of the FAA, the Court has determined whether contracts "evidenc[ed] a transaction involving commerce" by looking at whether the performance of those contracts, *in retrospect*, actually had some nexus with interstate commerce. *See Wilko v. Swan*, 346 U.S. 427, 428-430, 432 (1953) (the underlying contract evidenced a transaction in interstate commerce "in the light of the complaint" subsequently filed by one of the contracting parties, which alleged that it had been defrauded "through the instrumentalities of interstate commerce"), *overruled on other grounds*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 200-201 (1956) (an employment contract did not evidence a transaction involving commerce because, *inter alia*, the employee did not show that, in performing his duties under the contract, he had "engag[ed] in activity that affected commerce, within the meaning of our decisions") (footnote omitted).

II. IN ENACTING SECTION 2 OF THE FEDERAL ARBITRATION ACT, CONGRESS INTENDED TO EXERCISE THE FULL SCOPE OF ITS POWERS UNDER THE COMMERCE CLAUSE

The holding of the court below amounts to a finding that, in enacting Section 2 of the FAA, Congress chose to exercise only a portion of the powers granted to it by the Commerce Clause. However, neither the language of Section 2, nor Congress' purposes in enacting it, supports the conclusion that Congress intended to exercise less than its full powers under the Commerce

Clause. Indeed, although this Court has never specifically addressed the issue before it today -- the meaning of the FAA's phrase "a contract evidencing a transaction involving commerce" -- it has indicated that Congress intended to exercise its full powers under the Commerce Clause in enacting the FAA. *See Perry v. Thomas*, 482 U.S. at 490 ("the Federal Arbitration Act . . . embodies Congress' intent to provide for the enforcement of arbitration agreements *within the full reach of the Commerce Clause*") (emphasis added); *Southland Corp.*, 465 U.S. at 14 (Congress would only "need to call on the Commerce Clause if it intended the Act to apply in state courts. . . . We therefore view the 'involving commerce' requirement in § 2, not as an inexplicable limitation on the power of federal courts, but as a *necessary* qualification on a statute intended to apply in state and federal courts") (emphasis added)[4]; *Wilko v. Swan*, 346 U.S. at 438 ("Congress has afforded participants *in transactions subject to its legislative power* an opportunity generally to secure prompt, economical, and adequate solution of controversies through arbitration . . . .") (emphasis added).

A. The Plain Language Of Section 2 Does Not Limit The Reach Of The FAA To Transactions In Which The Contracting Parties Originally Contemplated Substantial Interstate Activity

Section 2 of the FAA provides that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of

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[4] Although it was "necessary" for Congress, if it wished to have the FAA apply in state courts, to limit the reach of the FAA to the scope of congressional powers under the Commerce Clause, it would not be "necessary" for Congress to further limit the reach of the FAA in the manner claimed by the court below.

> such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract.

9 U.S.C. § 2. "Commerce," in turn, is defined as:

> commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation . . . .

9 U.S.C. § 1.

Certainly, there is nothing in the language of the statute itself that requires the contracting parties to have contemplated "substantial" interstate activity at the time of contracting. Nor, as discussed above in Part I of the Argument, has the Commerce Clause ever been held to require such a limitation.

Moreover, interpreting the phrase "a contract evidencing a transaction involving interstate commerce" in the manner espoused by the court below produces an illogical result when that interpretation is applied to other parts of Section 2. Section 2 provides, in part, for the enforcement of agreements to arbitrate that are made only *after* a dispute has arisen between parties to an underlying contract -- namely, "agreement[s] in writing to submit to arbitration an existing controversy arising out of such a contract . . . ." 9 U.S.C. § 2 (emphasis added). It is clear, from context, that the words "such a contract" refer to "a contract evidencing a transaction involving commerce." Thus, if the court below were correct that a contract did not "evidenc[e] a transaction involving commerce" unless the parties had contemplated substantial interstate activity at the time of contracting, then the enforceability of post-dispute agreements to arbitrate would depend upon what the parties expected at the time that they entered into the underlying contract -- not when they agreed to arbitrate. It is difficult to imagine why Congress would refuse to enforce a post-dispute arbitration agreement, even if the parties

made it with full knowledge that the performance of the underlying contract had involved interstate activity, simply because at some earlier time, when they entered into the underlying contract, they did not expect that its performance would involve such activity.

B. In View Of The Purposes Behind Section 2, It Would Make No Sense To Limit The Reach Of The FAA To Transactions In Which The Contracting Parties Originally Contemplated Substantial Interstate Activity

Even if this Court were to decide that the language of Section 2 is not in itself dispositive, the purposes behind the passage of the FAA, as identified in past decisions of this Court, indicate that Congress intended to exercise the full scope of its powers under the Commerce Clause.

In enacting the FAA, Congress declared a strong federal policy favoring the enforcement of arbitration agreements and pre-empted attempts by states, like Alabama, to disfavor such agreements. As the Court held in *Southland Corp.*:

> In enacting § 2 of the [F]ederal [Arbitration] Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.
>
> * * *
>
> In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.

465 U.S. at 10, 16 (footnotes omitted). *See also Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983) ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary"). Given Congress' desire to override state laws that "undercut the enforceability of arbitration agreements," it would naturally want

to pre-empt such laws to the maximum extent that it could -- namely, to the maximum extent permitted by the Commerce Clause. The only conceivable reason for Congress to limit the application of Section 2 (and thus the FAA) to cases in which the contracting parties contemplated substantial interstate activity would be to prevent unfair surprise by application of the FAA where the parties had no reason to expect it. But there was no reason for Congress to worry about anyone being unfairly "surprised" by application of the FAA when, as this Court has repeatedly pointed out, the FAA merely effectuates the intentions of the parties by enforcing their own agreements to arbitrate. *See, e.g., Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478-479 (1989) (the FAA was designed, above all, to "ensur[e] that private agreements to arbitrate are enforced according to their terms"); *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 221 (1985) ("[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered . . . ."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) ("[t]he 'liberal federal policy favoring arbitration agreements' manifested by this provision [Section 2] and the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements . . . .") (citation omitted).

CONCLUSION

The holding of the court below imposes an arbitrary and unwarranted limitation on the reach of the FAA -- a limitation that finds no support either in the Commerce Clause or in the FAA itself. That holding, if permitted to stand, would allow states like Alabama to frustrate the strong federal policy favoring arbitration agreements and would thwart the reasonable expectations of both individuals and businesses, including life insurance companies, that their agreements to arbitrate will be enforced. Therefore, the judgment below should be reversed.

Respectfully submitted,

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